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Decision 16-06-059 June 23, 2016

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3.	Investigation 12-10-013 (Filed October 25, 2012)
And Related Matters.	Application 13-01-016 Application 13-03-005 Application 13-03-013 Application 13-03-014

ORDER MODIFYING D.15-11-034 AND DENYING REHEARING OF THE DECISION AS MODIFIED

I. INTRODUCTION

On December 21, 2015, an application for rehearing of Decision[1] (D.) 15-11-034 ("Decision") was timely filed by the World Business Academy ("WBA"). The Decision denied WBA's request for an award of intervenor compensation. Compensation was denied based on two findings of fact: (1) WBA was not a "customer" as defined in section 1802(b)(1)(A) and therefore legally ineligible for compensation; and (2) WBA failed to provide the financial documents required to support a claim of significant financial hardship. In its rehearing application, WBA alleges it nevertheless is

[1] All citations to Commission decisions are to the official pdf versions available on the Commission's website at: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>.

entitled to claim compensation. According to the rehearing application, an e-mail WBA received from the assigned administrative law judge ("ALJ") should be treated as a conclusive holding on its customer status and demonstration of financial hardship. WBA asserts this e-mail was equivalent to the "preliminary ruling" described in Public Utilities Code section 1804(b)[2] and claims such a ruling must be treated as an unreviewable, disposition of the matters it addresses. The rehearing application further claims that policy considerations, equitable principles, and contract law require us to give greater weight to the ALJ's July 12, 2013 e-mail, and fashion a remedy for WBA. The rehearing application makes the additional claim that under the United States Constitution WBA has a vested right to receive compensation. No response to the rehearing application was filed.

We have carefully considered all the arguments presented in the rehearing application, and have concluded that good cause for rehearing has not been shown. However, we will modify the Decision's findings to ensure they are clear. Accordingly, rehearing of D.15-11-034, as modified, is denied.

II. BACKGROUND

This Commission began awarding compensation to intervenors when the California Supreme Court decided it could do so in *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891. The money paid to intervenors comes from utility ratepayers. (Pub. Util. Code. § 1807(a).) In 1984, the Legislature codified the rules on compensation we had adopted, establishing the statutory intervenor compensation program found in sections 1801 to 1812. (Stats. 1984, ch. 297, §§ 1, 2; cf. *Southern California Gas Co. v. Public Utilities Com.* (1985) 38 Cal.3d 64.) These code sections (the "intervenor compensation statute") were revised in 1992 and 2003. (Stats. 1992, ch. 942; Stats 2003, ch. 300.) We have issued numerous decisions applying and interpreting the intervenor compensation statute. A comprehensive review

[2] All subsequent section references are to the Public Utilities Code unless otherwise indicated.

and discussion of the program's fundamental requirements is found in *Re: Commission's Intervenor Compensation Program* (1998) [D.98-04-059] 79 Cal.P.U.C. 628.

In general, the intervenor compensation statute encourages utility customers to contribute to Commission proceedings by providing for awards of compensation—as long as certain criteria are met. The Legislative intent section of the statute makes it clear that compensation is not available in proceedings involving transportation companies, for example. (Pub. Util. Code, § 1801.3(a).) Parties whose participation is unproductive, unnecessary, duplicative, or off-topic are also not eligible to be compensated. (Pub. Util. Code, § 1801.3(f).) Only parties who fall into one of three categories of "public utility customer" can be awarded compensation. (Pub. Util. Code, §§ 1801, 1802(b)(1).)

We have described the requirements intervenors must meet and the process by which they demonstrate their compliance as "accountability and control mechanisms[.]" This Commission applies these accountability and control mechanisms in order to maintain the balance the Legislature struck between "two competing goals:" encouraging effective participation by those affected by Commission proceedings and, on the other hand, preventing unnecessary or duplicative participation. (*Re: Commission's Intervenor Compensation Program* (1998) [D.98-04-059], 79 Cal.P.U.C. 628, 643.) This Commission applies standards to intervenors who seek compensation to, "ensure that compensated intervention provides value to the ratepayers that fund it." (*Ibid.)*

Relevant here, the statute provides that compensation awards are limited to the three categories of utility "customer," as defined in section 1802(b)(1)(A), (b)(1)(B) and (b)(1)(C). We set out the standards we use to implement these requirements in 1998 in *Re: Commission's Intervenor Compensation Program* [D.98-04-059], *supra*. Customers are those parties who are: "actual" utility customers participating to represent customers as a group, representatives authorized by such customers, and groups whose articles and bylaws authorize the representation of residential and the small business customers defined in section 1804(h). (*Re: Commission's Intervenor Compensation Program* [D.98-04-059], *supra*, p. 648.) Customers seeking compensation must also show that

participation in a Commission proceeding results in "significant financial hardship" and that their participation made a significant contribution to a Commission order or decision. This Commission generally requires non-profit organizations such as WBA to provide a detailed income and expense statement and a year-end balance sheet to demonstrate significant financial hardship. (*Id.,* at p. 651.)

In addition to establishing standards for parties seeking compensation, the intervenor compensation statute sets out procedural requirements that intervenors must follow. Intervenors must file a notice of intent ("NOI") at specific times as required by section 1804(a), and subsequently filing a request for award within 60 days of the issuance of a final decision as required by section 1804(c). The statute provides that an ALJ ruling can issue in response to the filing of an NOI, and in some cases a ruling is mandatory. Such a ruling must issue within 30 days of the filing of an NOI if the NOI attempts to demonstrate significant financial hardship. (Pub. Util. Code, § 1804(b)(1).) However, we adopt our own decision determining if compensation should be awarded, after we issue a decision on the merits of the proceeding. (Pub. Util. Code, §§ 1803, 1804 (c).)

The decision at issue here denied the request for an award of compensation that WBA submitted after a decision issued on the merits of this proceeding. This request had been opposed by SDG&E, which questioned the significance of WBA's claimed contributions. SDG&E noted that TURN, a sophisticated consumer representative that participated heavily in all phases of the proceeding[3] only requested an award of approximately $290,000, compared to WBA's request for approximately $425,000. (SDG&E Response to Request for Compensation Filed by WBS, February 23, 2015,

[3] TURN conducted extensive discovery, provided expert testimony, developed a specific position on the factual and legal questions at issue, and negotiated a complex settlement agreement.

p. 11; see Intervenor Compensation Claim of WBA, filed January 23, 2015.) SDG&E also stated other concerns about WBA's request.[4]

Prior to seeking its award on January 23, 2015, WBA had filed the statutorily required Notice of Intent ("NOI") on February 7, 2013. WBA subsequently amended that NOI and then, on July 8, 2013, WBA filed a Second Amended NOI. When the Second Amended NOI was filed, the ALJ sent an e-mail to WBA's counsel discussing several procedural matters. (See Comments of WBA on Proposed Decision, November 2, 2015, Attachment B.) As discussed in detail in Section III.B., below, the ALJ stated she had reviewed information provided with the new NOI and believed it to be adequate. Much of the e-mail discussed additional steps the ALJ asked WBA to take to be in compliance with procedural rules for filing material under seal.

III. DISCUSSION

A. This Commission Must Apply the Intervenor Compensation Statute's Requirements When it Determines if Compensation is To Be Awarded

The intervenor compensation statute clearly states that it is this Commission that approves claims for compensation. (e.g., Pub. Util. Code, § 1803.) The statute further states that only "customers" who have demonstrated significant financial hardship are eligible to receive compensation. (Pub. Util. Code, §§ 1801, 1803, 1804(a), 1804(e).) When we adopted the Decision, we did as the law required. We denied compensation to a party that was: (1) not a customer, and (2) failed to demonstrate significant financial hardship.

According to the rehearing application, however, we were legally bound to treat the statements made by the ALJ, which WBA characterizes as a ruling, as determinative. This claim asserts that an ALJ ruling issued in response to an NOI makes

[4] It is important to note that these issues were not resolved in the Decision and would require resolution if any award were to be made to WBA. The Decision only determined, as a threshold matter, that WBA could not apply for compensation because it was not a "customer" as required by statute and because it had failed to make the required of significant financial hardship.

conclusive and final determinations. The language of the intervenor compensation statute does not support this position. By statute, an ALJ issues a ruling (not a final decision) in response to an NOI. The force of that ruling is qualified several times in the statute. Such rulings are designated as "preliminary" and create only a "rebuttable presumption" regarding significant financial hardship.[5] The statute further makes it explicit that such a ruling cannot be read to "ensure[] compensation" or to "imply approval of any claim for compensation." (Pub. Util. Code, §§ 1804(b)(1), 1804(b)(2).)

On the other hand, the statute provides that we will consider and adopt a formal decision at the end of a proceeding in order to determine whether or not a party is to be awarded compensation. (e.g., Pub. Util. Code, §§ 1804(e).) In that decision, this Commission is to award compensation if certain requirements are met, including if the party requesting compensation is a customer and has demonstrated significant financial hardship. (Pub. Util. Code, § 1803.) None of these statutory provisions supports WBA's claim that an ALJ ruling issued in response to an NOI represents a conclusive and final determination establishing that a party falls under the statutory definition of "customer" or has demonstrated significant financial hardship.

The rehearing application, however, alleges that when section 1804(b)(1) uses the word "preliminary" to describe an ALJ's ruling on an NOI, the Legislature did not intend to confer on this Commission the ability to reach a different conclusion later in the proceeding. The rehearing application argues such rulings cannot be "overturned" except in cases of fraud or malfeasance. WBA additionally claims that the statute does not permit "an *ex post facto* reversal" of an ALJ ruling, because the statute "does not authorize the Commission to strip the intervenor of customer status[.]" (Rehearing

[5] The ALJ's e-mail was also qualified on the subject of significant financial hardship. That e-mail stated only that information submitted in response to a previous request showed that "participating in this proceeding *could* result in significant financial hardship …." (See Comments of WBA on Proposed Decision, November 2, 2015, Attachment B (emphasis added).) This alone is sufficient to show that the Decision was not in error, given the statutory language qualifying the effect of ALJ rulings issued in response to NOIs.

Application, pp. 6, 7.) Yet WBA fails to identify any statutory provisions placing such limits on this Commission's ability to decide questions of intervenor eligibility. In fact, applicable statutory authority requires us to consider all material aspects of a question placed before us, and to make record-based findings on all the material questions that affect the ultimate disposition of a matter. (Pub. Util. Code, §§ 1705, 1757.) This Commission is also a five-member body and it requires a majority of those five members to form a quorum "for the transaction of any business, for the performance of any duty, or for the exercise of any power of the [C]ommission." (Pub. Util. Code, § 310.) It is this Commission—not the ALJ—that is authorized by sections 1803 and 1804(e) to award intervenor compensation to "customers" who made a significant contribution and demonstrated significant financial hardship. Thus, the rehearing application is simply incorrect when it claims that a "preliminary" ruling by a single ALJ, the effect of which is otherwise qualified by statute, determines conclusively whether a party is, as a matter of fact, an eligible "customer," or has demonstrated significant financial hardship.[6]

According to WBA, however, under section 1804 certain issues are conclusively decided in the "preliminary ruling" outlined in that section and, therefore, outside our ability to consider. (Rehearing Application, p. 6.) WBA relies on provisions stating that only an intervenor "who has been found, pursuant to [section 1804] subdivision (b) to be eligible" may request compensation under section 1804(c), and on language that requires our decision on compensation to address the question of substantial contribution. The rehearing application argues that this Commission should "only" address the question of substantial contribution in its decision on compensation

[6] Review of our past decisions confirms that we have, consistently over time, treated ALJ rulings issued pursuant to section 1804 as non-binding when we applied the intervenor compensation statute. Those decisions review the underlying facts and reasoning of ALJ rulings and "affirm" those rulings when we agree with the ALJ's determination. (E.g., *Awarding Intervenor Compensation to SSRC* [D.04-02-026] (2004), pp. 5-6.)

because other issues have been definitively resolved at the NOI stage. (Rehearing Application, p. 7.)

WBA's reading lacks plausibility. The view that an ALJ ruling should be given more force than a Commission decision—when no explicit statutory language achieves this result—does not account for the clear difference between the nature (and the legal effect) of such a ruling and a Commission decision. Moreover, the statute clearly states that intervenors must be customers and demonstrate significant financial hardship. Yet the rehearing application proposes the statute be read to require us to allow compensation even if we were presented with a record showing that an intervenor was not, for example, a customer. The rehearing application's reading of the statute also ignores the methods we have established to implement the statute. We have adopted a longstanding practice of implementing the statute so that this Commission, in its ultimate decisions on compensation, makes the final determination on whether an intervenor was a customer and had demonstrated significant financial hardship. Legislative intent cited by the rehearing application fails to explain why making the program "streamlined" would require us to take a different approach. (Cf. Pub. Util. Code, § 1801(c).) That intent is achieved by ensuring that intervenors identify themselves and state their positions before a proceeding begins in earnest. The timing of the NOI requirement ensures that intervenors identify themselves and the issues they will pursue before the main part of a proceeding gets underway. This allows for a coordinated proceeding and avoids duplication of effort. There is no need to read the statute, instead, to confer an unusual effect on a preliminary ruling to achieve the Legislature's intent.

The rehearing application also relies heavily on policy considerations when it argues that an ALJ ruling should be given conclusive effect. (e.g., Rehearing Application, pp. 3-5.) WBA claims, for example, that it should be allowed to have interpreted the ALJ's e-mail as a "green light" and to have formed a belief that the ALJ gave her "word" in that e-mail. The rehearing application further argues WBA could have "turned its efforts away" from this proceeding, and that we should not have denied compensation because WBA "devoted resources" to this proceeding. Such policy

arguments are not persuasive, because they do not show why it was legal error for us to base D.15-11-034 on statutory requirements and record evidence rather than on WBA's expectation that it would be compensated.[7]

B. An Off-the-Record E-mail from An ALJ is Not the Formal ALJ Ruling Described in Section 1804, Nor Is Such an E-mail a Government Contract or a "Clear Promise" Under Principles of Estoppel

The rehearing application's claim that the existence of an ALJ ruling would have prevented the Decision from reviewing the record and making findings on WBA's customer status and its demonstration of financial hardship is also incorrect because no ruling pursuant to section 1804 was formally issued or served, or entered into the record of this proceeding. WBA seeks to characterize procedural correspondence as a ruling that definitively resolves the question of WBA's customer status and demonstration of financial hardship. To make this claim, the rehearing application relies on the ALJ's statement that she "finds that WBA has met the preliminary requirements for eligibility as an intervenor" and demonstrated significant financial hardship. (Comments of WBA on Proposed Decision, November 2, 2015, Attachment B.) However, as discussed below, this claim reads too much into an informal e-mail that was qualified, provided without context, and was not served on parties or filed in the formal record.[8]

Review of the ALJ's e-mail shows that the ALJ chose not to characterize her findings as a ruling. The e-mail also does not contain any discussion of the facts that would underpin a ruling holding that WBA had met the relevant statutory requirements. Much of the e-mail, in fact, discusses technical problems with documents filed to support

[7] The rehearing application also fails to acknowledge that this Commission has selected a different policy as preferable. In *Re: Commission's Intervenor Compensation Program* [D.98-04-059], *supra,* we adopted a policy to diligently apply accountability and control mechanisms, and to award compensation only when parties had shown that they met statutory requirements.

[8] Section 1804(b)(1) requires that a ruling be issued within 30 days of the filing of a NOI, and the absence of a formal ruling makes the circumstances here awkward. The e-mail to which WBA refers was not served, not file-stamped, and only appears in our correspondence file. However, the remedy for the failure to issue a required ruling or any other irregularity would not be to use ratepayer funds to pay WBA compensation, without regard to whether or not it met statutory requirements.

the Second Amended NOI. (The subject line of the e-mail refers to a motion to file under seal, not to the NOI itself.) Given these surrounding circumstances, the rehearing application is incorrect when it argues that the ALJ's statements must be given significant weight and treated as determinations on eligibility, adopted by formal ruling. We will modify the Decision to make it clear that the record does not support giving great weight to this informal correspondence.

The rehearing application also claims that the e-mail WBA provided should be given the force and effect of a government contract. According to WBA, a contract should be found to "arise" in this proceeding because there was "a promise followed by reasonable and detrimental reliance." (Rehearing application at p. 8, citing *Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031.) The rehearing application claims that when we issued D.15-11-034, we interfered with the property rights vested by such a contract, to the extent that property was taken without due process of law.

This claim fails to demonstrate error for several reasons. As discussed above, this Commission can only act by a majority vote, and individual ALJs have not been delegated the authority to enter into contracts on our behalf. Any assumption that a single e-mail binds this Commission in contract would be unreasonable, and fail to meet the test the rehearing application proposes. Moreover, the actual holding in *Garcia, supra,* is that detrimental reliance can be used to overcome a lack of express consideration that would otherwise prevent principles of promissory estoppel principles from applying. That technical point of law does not stand for the principle the rehearing application advances, namely, that in the absence of an express writing a government contract is nonetheless formed as long as there is "a promise followed by reasonable and detrimental reliance." To the contrary, even under the rules of detrimental reliance other conditions must apply, such as "a promise in clear an unambiguous in its terms …." (*Id.*

at p. 1037.) As discussed above, the ALJ's e-mail was not clear and unambiguous in this respect.[9]

The inability of WBA to show that any contract was formed makes authority such as *US v. Winstar Corp.* (1996) 518 U.S. 839 inapplicable. That case addressed a situation where an "express contract" had been entered into by the U.S. government in order to induce a healthy savings institution to buy a failing institution. (*Id.,* p. 859.) No such written contracts are present here.[10] Similarly, in *Avco Community Developers, Inc. v. South Coast Reigonal Com.* (1976) 17 Cal.3d 785 the governmental body in question took formal action by issuing a building permit. The rehearing application fails to explain why an off-the-record e-mail, the legal effects of which are unclear at best, should be considered analogous to a formally-issued building permit.

The rehearing application also fails to explain why the intervenor compensation statute should be analogized to the public contracting requirements in the Public Contracts Code. Although there is no obvious relation between an agency soliciting bids on a project and our seeking to have potential intervenors identify themselves and avoid duplication of effort, the rehearing application asserts such an analogy must apply here. This argument is unpersuasive. Our proceedings do not require the participation of intervenors, and this Commission is not seeking to recruit intervenors

[9] WBA's claim also fails to address such basic contract law requirements as: the capacity of both parties to enter into a contract, the existence of a formal writing, the communication of an acceptance of an offer, the demonstration of mutual assent to be bound in contract, and the existence of consideration. (See 1 Witkin, Cal. Law, 10th ed. (2005) Contracts, §§ 121, 133, 137, 187, 203, at pp. 160, 172, 176, 221, 236.) WBA further fails take account of the black-letter rule that a promise to perform a legal duty cannot constitute a contract, even though the rehearing application's main claim is that this Commission has a legal duty to consider its request for award. (*Id.,* § 218, p. 251.)

[10] To the extent the rehearing application makes a broader due process argument, it is important to note that a draft of the Decision was circulated to all parties in this proceeding, with an opportunity to comment. WBA filed comments on November 2, 2015.

as paid-for advocates analogous to the contractors who are compensated to perform government functions, such as road construction.[11]

The rehearing application also mischaracterizes the ALJ's e-mail when it attempts to rely on the law of promissory estoppel. WBA claims that the ALJ made a "clear promise" on which it was entitled to rely. This claim interprets the ALJ's e-mail in a way that departs from what the ALJ actually wrote. The ALJ stated that documents provided by WBA (emphasis added):

> are responsive to my request for additional information and establish that WBA is a customer of SCE and that a participation in the proceeding *could* result in significant financial hardship ….

The ALJ further conditioned a statement that WBA had met the "*preliminary* requirements for eligibility as an intervenor" with a "subject to" clause requiring WBA to make new filings along the lines specified in the e-mail. (Comments of WBA on Proposed Decision, November 2, 2015, Attachment B (emphasis added).)

The rehearing application, on the other hand claims that the ALJ made "essentially" the following clear promise, which it sets off in quotation marks:

> you are a proper intervenor, and as such, may be entitled to compensation for your efforts ….

(Rehearing Application, p. 11.) This so-called promise was never made, either by the ALJ or this Commission itself.

[11] *Kajima/Ray Wilson v. L.A. Co. Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, and other cases which the rehearing application discusses, are therefore not on point. In that case the Court was concerned that a construction company incurred the expenses of preparing a bid with the expectation that the lowest bid would win a contract. The Court found that the government entity involved had effectively promised that the lowest bidder would win the contract, but then made a different award. In Commission proceedings, on the other hand, there is no guarantee of compensation. Only those intervenors who are eligible and who "in the judgement of the [c]ommission" are found to have provided substantial assistance to the decision-making process have the opportunity to recoup their costs. (Pub. Util. Code, §§ 1802(i), 1804(b)(2).)

As a result, the rehearing application has failed to show the elements of promissory estoppel are present here. The elements required in California are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise was made; (3) the reliance must be both reasonable and foreseeable; and (4) the party asserting estoppel must be injured by its reliance. (*Ernest Laks v. Coast Federal Savings and Loan* (1976) 60 Cal.App.3d 385, 890.) Yet the ALJ's language was not an unqualified or unambiguous promise, as noted above. It was also unreasonable for WBA to read a qualified statement by the ALJ as a promise that we would never review the record or consider WBA's eligibility. This Commission has explicitly held that estoppel principles cannot be invoked to prevent it from identifying and responding to legal requirements that prevent a party from being awarded compensation. We have so ruled in cases where the ALJ preliminarily found eligibility to exist, and where we ourselves issued an order implying compensation could be awarded.[12] (*Denying Rehearing of D.07-12-006* (2008) [D.08-11-061], p. 15, 2008 Cal.P.U.C.LEXIS 572, pp. 24-35; *Denying Notices of Intent to Claim Compensation* (2014) [D.14-05-030], 2014 Cal.P.U.C. LEXIS 217, pp. 23-28.) WBA is represented by sophisticated counsel who are familiar with the Commission and its procedures, and should have been aware of the position we have taken in past decisions. Similarly, WBA's decision to treat the ALJ's e-mail as a promise could not have been foreseeable to the ALJ, especially in light of our longstanding practice of reviewing the substance of a party's eligibility when we issue a decision on that party's claims. Moreover, while the rehearing application places great weight on its claim that WBA would not have participated in this proceeding but for the ALJ's e-mail, that statement is not supported by any reference to the record and may

[12] The rehearing application attempts to distinguish these holdings on the grounds that they only apply to proceedings not covered by the intervenor compensation statute, as opposed to parties whose compensation is not permitted under the statute. (Rehearing Application, p. 11.) This is a distinction without a difference. In both cases, parties sought to be compensated, despite contravening the statute, on the grounds that prior actions by this Commission or an ALJ prevented us from later determining that compensation was not legally proper.

represent only an assertion of counsel. (See Rules of Practice and Procedure, Rule 16.1(c).)[13]

For similar reasons the requirements of equitable estoppel are not met here. That doctrine provides that a person may not deny the existence of a state of facts if that person intentionally led another to believe a particular circumstance to be true, and to rely upon such belief to the other person's detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend its conduct to be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to that party's injury. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.) Additionally, this doctrine may apply to the government entities when justice and right require it, but the doctrine is inapplicable if it would result in the nullification of a strong rule of policy adopted for the benefit of the public. (*Ibid*.)

The rehearing application makes no claim that we intentionally misled WBA into reading too much into the ALJ's e-mail, nor can it. The intervenor compensation statute and our own decisions clearly state the approach we take: preliminary statements confirming an ALJ's view that a party is eligible for compensation are not considered to be final determinations. In this case, an informal e-mail cannot properly be said to lead a party to believe that we will later find that they meet statutory requirements for being a "customers" or financial hardship, or have obtained any confirmation from this Commission about their status. Similarly, WBA has failed to show that the ALJ intended WBA to act in reliance on her statements, or that WBA was ignorant of the true facts—which pertained to WBA's own finances and corporate governance structure. More importantly, the rehearing application fails to

[13] The Commission's Rules of Practice and Procedure ("Rules") are codified in the California Code of Regulations, Title 20, at sections 1.1-18.1.

explain why awarding ratepayer funds to WBA when, as a factual matter, it was not a "customer" and had not demonstrated significant financial hardship would contravene policies adopted for the benefit of the ratepaying public, who fund intervenor compensation awards. As a result, the rehearing application only selectively applies principles of is promissory estoppel and equitable estoppel when it discusses cases such as *Kajima/Ray Wilson v. L.A. Co. Metropolitan Transportation Authority, supra,* and *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, and fails to demonstrate error.

C. The Record Shows That, As a Matter of Fact, WBA Did Not Meet The Criteria that Apply to Parties Seeking Compensation

When the Decision found that WBA was not a customer and had not demonstrated significant financial hardship, its determinations reflected the clear evidence in the record. Review of the record did not identify any evidence that would support findings that WBA is a customer or had properly demonstrated significant financial hardship, and the rehearing application does not identify any evidence that would support such findings.[14] (See Rule 16.1(c).) As discussed above, the rehearing application claims that procedural reasons, policy considerations, and principles of contract and estoppel prevented the Commission from reviewing the record to confirm that WBA met the requirements of the intervenor compensation statute. In addition to failing to succeed on their own merits, those claims fail to demonstrate error for an independent reason. When, as a matter of fact, a party fails to meet a statutory requirement, the Commission must address that fact. If, previously, it was thought that different facts pertained, the Commission is obligated to correct such previous errors, not defer to them, especially now that this proceeding is subject to a rehearing request. (See

[14] The rehearing application claims that different findings, if they were to be made, should be made based on material newly submitted by WBA, for example, documents purporting to show WBA amended its by-laws after the Decision issued. The submission of new information clearly shows that findings that WBA was a customer and had demonstrated significant financial hardship were unsupportable based on the record. As noted above, the new material submitted by WBA is also insufficient to allow the findings WBA prefers to be made.

Denying Rehearing of D.07-12-006 (2008) [D.08-11-061], p. 17, 2008 Cal.P.U.C. LEXIS 572, 30.)

It is clear that the Decision's findings are based on the record. The Decision denied WBA's request for compensation because it found, as a matter of fact, two of the program's eligibility criteria had not been met. Specifically, WBA had not shown that it was "customer" as defined in section 1802(b)(1)(A). In its NOI, WBA claimed it was a Category 1 customer, i.e., that it met the requirements of section 1802(b)(1)(A). Such an intervenor must be an "actual utility customer …." (*Re: Commission's Intervenor Compensation Program* [D.98-04-059], *supra,* at p. 648.) WBA, on the other hand, could not show that it was an actual utility customer. The record showed that WBA did not take power under its own account from SCE, and had made different arrangements to obtain power.

In addition, WBA had failed to meet the second prong of the test for being a Category 1 customer. That prong requires parties to represent more than their own self-interest and to speak for ordinary residential and small business customers as a "self-appointed representative." (*Re: Commission's Intervenor Compensation Program* [D.98-04-059], *supra,*79 Cal.P.U.C.2d at p. 648.) WBA, however, was not constituted to be an advocate for residential or small ("bundled") business customers. Instead, the record showed that WBA was a business-oriented think tank with connections to prominent universities and high-profile public commentators and educators. (D.15-11-034, at p. 5.) Based on this evidence,[15] the Decision found that WBA took on the role of agent for medium and large businesses, or wealthy individuals who are

[15] When WBA changed its position and attempted to qualify as a Category 3 customer, it attempted to characterize itself as an environmental group, similar to the Sierra Club, and repeats those claims in its rehearing application. (Rehearing Application p. 13.) However, the standard we apply is not whether or not a party advances views that express a concern for the environment, but whether that party represents residential and small business customer interests in the environment. We explained that the dispositive factor was the nature of the customers whose environmental interests were represented in *Re: Commission's Intervenor Compensation Program* [D.98-04-059], *supra,* at page 688, footnote 14. There, we contrasted parties that represented business interests with non-profits that represented low-income residential customers or the environmental concerns of ordinary residential customers.

normally considered "able to fund the representation of their interests without using the intervenor compensation program …." (D.15-11-034, at pp. 3-4, citing *Re: Commission's Intervenor Compensation Program* [D.98-04-059], *supra,* at p. 648; cf. Pub. Util. Code, § 1801.) When it made these findings, the Decision specifically referred to record material, including WBA's description of its structure and purpose in the NOI, and to WBA's web site, which WBA referenced in the NOI as a supporting document for the statements made therein.[16]

The Decision was also correct to find that the record showed WBA could not meet the test for being a Category 3 customer. WBA's by-laws, as effective during the time when it participated in the proceedings before this Commission, did not authorize WBA to be the type of ratepayer representative that would meet the requirements for being a Category 3 customer. The finding that WBA was not a Category 3 customer when it participated in this proceeding therefore has strong record support. Moreover, WBA belatedly changed its position on its customer status, claiming to be a Category 3 customer in its comments on the proposed decision. Such a claim is untimely, as explained in D.15-11-034, and WBA's specific claim was also incomplete.[17]

[16] While the best practice would be to take official notice of the web site, WBA has not commented on the Decision's approach and appears to be in accord. The requirements of Rule 13.9 appear to have been met in large part and we will waive the need to make take a more formal approach to referring to the web site, pursuant to Rule 1.2.

[17] WBA seeks to re-start the process of seeking compensation, and asks for rehearing to be granted so it can make a fresh start based on a restated NOI filed in December 2015, after the Decision issued. In support of this request, the rehearing application states that beginning on December 17, 2015, WBA's by-laws were amended to meet the requirements for Category 3 customers. Such an amendment cannot resolve the defect with WBA's claim to be a Category 3 customer. At the time WBA participated in this proceeding, the by-laws adopted in December 2015 were not in effect. In addition, an NOI filed in December 2015 in conjunction with an application for rehearing does not meet the intervenor compensation program's requirements. The deadline for filing an NOI in this proceeding was in February 2013. NOIs cannot be filed after a decision on a request for award has been adopted. In addition, the purpose of a rehearing is to resolve legal error that has been identified in a decision, not to allow parties additional opportunities to present new material, or pursue alternative claims based on new theories. (Cf., *Modifying D.10-12-052 and Denying Rehearing* (2011) [D.11-04-034], pp. 17-18, 2011 Cal.P.U.C. LEXIS 246, p. 33.)

The Decision separately found that WBA failed to demonstrate significant financial hardship. We require non-profits such as WBA to submit detailed income and expense statements, and year-end balance sheets, if they seek to make such a showing. (D.15-11-034, at p. 6.) WBA, instead, provided only an unaudited financial report. The Decision's finding was properly based on the record, and, again, represents a correct factual finding. To make these points clear, we are modifying the Decision to make more detailed findings of fact.

IV. CONCLUSION

In the Decision we properly denied WBA compensation because it had not demonstrated significant financial hardship and was not a customer, as defined by statute. The application for rehearing makes a series of allegations, claiming that the ALJ's July 12, 2013 e-mail should be considered determinative here, relying on principles of contract and equity, as well as policy considerations. However, no error has been shown. In this order, we have explained why the Decision is legally correct, and we will make modifications to the Decision to make its reasoning more clear.

IT IS ORDERED that:

1. The third sentence of the last paragraph on page 8 of D.15-11-034, which sentence begins, "Setting aside…" is modified to read:

> Setting aside the lack of formality in the July 12, 2013 communication from the ALJ, which would prevent this communication from being considered a formal ruling (i.e., the failure to file and serve the communication regarding preliminary eligibility and response to the motion to file confidential materials under seal), a preliminary finding of eligibility by an ALJ does not guarantee that the intervenor will be ultimately determined to be a customer or receive compensation.

2. Finding of Fact 1 on page 9 is restated to read:

> 1. The record shows that WBA failed to demonstrate that it is an "actual customer" of its serving utility, as required by the intervenor compensation program.

3. Finding of Fact 2 on page 9 is restated to read:

2. The record shows that WBA failed to demonstrate that it represents the interests of ordinary residential and small business customers. Material submitted by WBA shows this organization represents the interests of medium and large businesses and prominent or wealthy public commenters or educators.

4. Finding of Fact 3 on page 9 is restated to read:

3. World Business Academy has not demonstrated its status as a "customer" pursuant to section 1802(b).

5. A new Finding of Fact 4 is added on page 9 to read:

4. A non-profit demonstrates significant financial hardship by submitting detailed income and expense statements and a year-end balance sheet. WBA submitted an unaudited financial statement.

6. A new Finding of Fact 5 is added on page 9 to read:

5. World Business Academy has not demonstrated significant financial hardship pursuant to section 1802(g).

7. A new Finding of Fact 6 is added on page 9 to read:

6. The by-laws of World Business Academy did not meet the requirements for a Category 3 customer until December, 2015. When World Business Academy participated in this proceeding it could not have been a Category 3 customer.

8. A new Finding of Fact 7 is added on page 9 to read:

7. The record shows that a procedural e-mail identified by World Business Academy was not filed in the formal record or served. This record does not support giving great weight to such information, and this information does not have the effect of a ruling.

9. A new Finding of Fact 8 is added on page 9 to read:

8. Since World Business Academy is not eligible to claim intervenor compensation, the issues of World Business Academy's substantial contribution to D.14-11-040 and of the reasonableness of the requested compensation are moot.

10. Rehearing of D.15-11-034 as modified herein is denied.

This order is effective today.

Dated June 23, 2016, at San Francisco, California.

MICHAEL PICKER
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
LIANE M. RANDOLPH
Commissioners